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No. ~~385~~ 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Appeal from the Supreme Court of Ohio

THE YOUNGSTOWN SHEET & TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 588

THE YOUNGSTOWN SHEET & TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

MOTION TO DISMISS

Appellee, pursuant to Rule 16 (b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the grounds that no substantial federal question is presented thereby, and that the decision of the Supreme Court of Ohio, from which appeal was taken, rests upon adequate nonfederal grounds.

STATEMENT OF THE CASE

The appellant is a resident corporation engaged in the business of manufacturing iron and steel.

Appellant held certain domestic iron ore and raw materials for use in manufacturing and certain finished prod-

ucts for ultimate sale. The Tax Commissioner of Ohio held these properties subject to the Ohio personal property tax despite appellant's claim that the levy against them was unconstitutional on the basis of discrimination in that non-residents holding such property in a storage warehouse for storage only were not required to pay the tax. The Ohio Supreme Court ultimately upheld the Tax Commissioner's action.

Additionally, appellant imported five grades of foreign iron ore for use in its manufacturing processes. These ores were stock-piled on appellant's premises in five separate piles. As need arose for a particular grade of ore it was removed from its stock-pile for use in the manufacturing processes. As an additional shipment of a particular grade of ore was received, it was placed upon and commingled with the existing stock-pile of that grade of ore. The Tax Commissioner determined that these foreign ores had lost identity as imports due to the breaking of import units and the commingling of the ores with domesticated property. This action was likewise affirmed by the Supreme Court of Ohio.

ARGUMENT

All that has been said in the companion case of *Allied Stores of Ohio, Inc., v. Bowers* on the question of discrimination as to merchandise held in a storage warehouse is incorporated herein as though fully restated.

The additional question at issue in this appeal is whether iron ore imported from foreign countries loses its character as an import and becomes subject to personal property taxation by a state because of the domestication and commingling of the ore.

Personal property is made subject to taxation in Section 5709.01, Revised Code of Ohio, as follows:

> "* * * All personal property located and used in business in this state * * * are subject to taxation, regardless of the residence of the owners thereof. * * *"

Section 5711.01, Revised Code of Ohio, defining that property which must be listed for purposes of taxation, reads in part:

> "(A) 'Taxable property' includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code * * *"

Section 5701.03, Revised Code of Ohio, defines personal property:

> "* * * 'personal property' includes every tangible thing which is the subject of ownership, whether animate or inanimate * * *"

Thus the imported iron ores stored at the plant sites of the appellant for use in the appellant's open hearth furnaces or blast furnaces for the production of steel or iron are by definition personal property subject to taxation by the state unless otherwise privileged.

This appeal is concerned with the constitutional privilege provided in Article I, Section 10, of the Constitution of the United States, as follows:

"* * * * * * * * * *

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * *"

The question presented is not novel. Many decisions have been reported on the question of when an import loses its identity as such and becomes part of the general mass of personal property in a state. The Ohio Board of Tax Appeals in a thorough discussion of the problem here presented refers to many of the leading cases on the subject. In treating of the "original package" theory specific reference is made to the case of *Washington Chocolate Company v. King County*, 21 Wash. (2d), 630, 152 P. 2d, 981, wherein three tests are listed for determining whether imports have lost identity as such. The second paragraph of the syllabus in that case states:

"Imported merchandise loses its constitutional immunity from state taxation (1) when it is no longer in the original package; (2) when the importer has so acted upon it that it has lost its character as an import and has become a part of the general mass of property in the state; and (3) when it has been sold by the original importer to a purchaser, even though it remains in the original package."

Item 2 in the above quotation points out the position of the Tax Commissioner in the instant appeal. This theory was also noted by Chief Justice Marshall in the leading case of *Brown, et al., v. The State of Maryland*, 12 Wheat., 419, 6 L. Ed., 678, when he stated at page 441-686:

"* * * it might be premature to state any rule as being universal in its application. It is sufficient

for the present to say, generally, that *when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import,* and has become subject to the taxing power of the State * * *" (Emphasis added.)

The appellant, as before said, imported iron ore from five different foreign countries. These ores were never intermingled, but were carefully kept in separate stock-piles. The appellant attempted at all times to keep on hand a three months' supply of each type of ore. Substantial portions of each stock-pile were removed in the ordinary course of appellant's manufacturing business. Upon arrival at appellant's premises of a subsequent unit of a particular grade of ore, it was placed on top of and commingled with the partially depleted stock-pile of ore of the same kind. This general practice, it is submitted, resulted in a domestication of all of the stock-piled ore. This practice removed from the import its nature as an import and thereby rendered the ore outside the protection of Article I, Section 10, of the Constitution of the United States.

The conclusion of the Supreme Court of Ohio appears at page 126 of the opinion in *Youngstown Sheet & Tube Co. v. Bowers*, 166 Ohio St., 122, and is stated in these words:

> "If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, we do not believe that such protection can extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing."

Appellant claims that this appeal presents a question of great import, a substantial federal question. It is the contention of the appellee that no such question is presented hereby, but that rather the question is merely one of a factual determination: to wit, whether the import lost its character by action of the appellant, and became part of the mass of property of the state. It is submitted that the conclusion of the Supreme Court of Ohio that the import character of the property had been removed was the proper factual determination and should not be reviewed.

CONCLUSION

It is therefore concluded that no substantial federal question is presented in either aspect of this appeal and that the appeal should be dismissed.

Respectfully submitted,

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